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Washington State Department of Transportation
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May 22, 2008

Ms. Anne K. Quinlan. Esq
Acting Secretary
Surface Transportation Board
395 E Street. SW
Washington DC 20423

Dear Ms. Quinlan:

Re STB Ex Parte No 677 - Common Carrier Obligation of Railroads

Please accept the submittal of our revised testimony. We wish our written testimony submitted on April 22, 2008 to match our oral testimony given on April 24. 2008.

Freight and passenger rail operations and maintenance are destined to create various viewpoints from those around the country and from those who care about our state, regional and national transportation systems. We appreciate the opportunity to share with you some of the perspectives expressed by members of our state's shipping industry.

The state of Washington has enjoyed positive cooperative working relationships with both BNSF and UP, the Class 1 railroads that serve our state. We look forward to continued cooperation as we work together to maintain and improve our state's rail infrastructure.

Sincerely,

Paula J. Hammond, P.E
Secretary of Transportation

PJH:amr

cc: Steve Reinmuth, WSDOT
Barbara Ivanov, WSDOT
Scott Witt, WSDOT

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Ex Parte N. 677

COMMON CARRIER OBLIGATION OF RAILROADS

April 20, 2008

STATEMENT OF

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

The Washington State Department of Transportation (WSDOT) appreciates the opportunity afforded by the STB in conducting this hearing and allowing for testimony to be received from the state WSDOT has developed a strong working relationship with rail service providers in our state including the Class 1 railroads, the shortline operators, and passenger rail. Our partnerships with the two Class 1 railroads that operate in Washington – BNSF and UP – have resulted in a number of key rail infrastructure projects that have produced significant benefit for the state, local communities, our ports and our local our shippers. There are, of course, significant opportunities to improve our coordination of investments to produce greater benefits to the state and national rail system As the use of our state's rail infrastructure grows we, as with other states, are beginning to reach capacity on our system at the same time that public funding of transportation infrastructure in general is being increasingly strained WSDOT is responsible for ensuring our investments are being made strategically, to generate the greatest efficiency from the system in a way that benefits our freight community and our state's economy

This testimony is a compilation of questions and concerns from a variety of rail shippers, receivers, ports, manufacturers, local governmental entities, and individuals who have an interest in the common carrier obligation of railroads and were willing to put forth these comments and questions for presentation before the Surface Transportation Board in this hearing In the testimony these comments are referred to collectively as the "stakeholders". As stated in the oral testimony given at the hearing, these questions or concerns do not necessarily reflect the position of the Washington State Department of Transportation or the Governor's Office, but those of the Stakeholders who were contacted and chose to comment

1. An Overview

Washington State is comprised of 2,360 miles of Class I railroad route miles and also 22 shortline railroads that operate to serve shippers throughout the state The majority of Class I track is owned by BNSF with the Union Pacific (UP) having tracks from the state border with Idaho (just East of Spokane) to the state border with Oregon (just South of Pasco). UP does have operating agreements over several of the BNSF Main Lines in the state

There are three routes from both East to West across the state and these are constrained by geographic features including grades crossing the mountain ranges or by the impact of the Columbia River. This constraint is felt most by the restrictions it places on train length and tonnage and additionally the route via Stampede pass has height limitations All the routes are single track with few passing points and imposes a limit on the capacity of the routes This has placed both the shippers in Eastern Washington and the International Ports at a disadvantage as they all compete for limited capacity

Washington State and the Department of Transportation is concerned that there is no overall rail strategy from the Federal government and this allows the ports in the Pacific Northwest to have their competitive ability constrained by railroad investment. As the UP has access only to the Ports of Tacoma and Seattle over BNSF tracks, investment in this area appears to be limited by both railroads The North-South route is also a bottleneck for Amtrak passenger trains which incur delays due to congestion from freight movements. Washington State has invested heavily in BNSF infrastructure to support the train slots for the Amtrak Cascades service and Sound Transit (a county governmental agency) has also invested in the route to accommodate their commuter rail services.

BNSF railroad has made this investment a requirement before allowing additional paths and Washington State has made the investment willingly and does not view this as unreasonable

One of the issues that has come to the forefront with the new business model of the Class I Railroads is the impact on local communities throughout the state Long (usually 110 car) trains, moving at relatively slow speeds cause major impacts at grade crossings for local communities. Many of these local communities do not have the taxing ability to pay for a grade separation and this conflict between modes is likely to get worse as the railroads send more and more trains over routes that were previously lightly used

Within Washington State, concern has been expressed by local groups about closure of certain sections of line when the Class I railroad finds insufficient need to keep them in place The state has funded the purchase of some of these lines to maintain the routes but does not have funds to be ensure that they can always do this. Elsewhere in the world an onus is placed on the railroad to ensure that the tracks are not recovered for 25

years after the closure is agreed upon While the cost of doing this may have to be worked out, stakeholders believe that this option would allow the closed rail sections to be returned to use more easily if the demand for rail services increases. They also believe it would also ease the impact on communities impacted by the closures by giving them time to develop an alternative method of providing service on the line

Another aspect of this closure procedure surrounds the way that publication takes place By listing the precise location (e.g. a rail junction) where the abandonment is to take place, it is often not clear to the general public people what the impact of this may be Stakeholders would welcome a more explicit posting of the abandonment application so the impact is more transparent

2. Service limitations resulting from a capacity constrained environment.

Railroads have limited capacity for rail line maintenance and improvement due to constrained capital and, therefore make investment decisions that will generate the greatest return based on their strategic business model While this is a reasonable business approach, the impact of those decisions on Washington shippers can be significant If the railroads invest heavily in either one line of business or one region, other market participants will likely be excluded. Therefore, these investment strategies can have the affect of regulating interstate commerce Stakeholders believe the disproportionate investment by the Class I Western railroads in the Pacific Southwest has put Washington State Ports at a distinct disadvantage in terms of additional sidings, terminals, and arrival and departure tracks

The rail system in Washington State, particularly in that portion of the system that parallels Interstate 5, is vitally important to our regional and national economy This rail

line serves movement of goods to and from our deep water ports. In addition, this rail line provides the ability to move people through Amtrak Cascades intercity rail passenger service between Eugene, Oregon and Vancouver, B C and Sounder commuter rail service in the Central Puget Sound region

More than 676,000 passengers used Amtrak Cascades in 2007 During the first quarter of 2008, ridership is more than 14% higher than the first quarter of the previous year Since 1994, WSDOT has invested $134 million in rail passenger related capital upgrades and more than $175 million in Amtrak Cascades operations. Major additional capital expansion investments will be under construction in 2008 Class 1 railroads in Washington have been generally supportive of the state's interest in providing passenger service, and have participated in several projects that have improved Amtrak service to our citizens

In order to provide adequate infrastructure and rail capacity that can accommodate these diverse and growing demands both now and in the future, a systematic approach must be embraced that carefully considers the needs of all rail users The system needs to move its passengers and cargo efficiently and reliably, regardless of the type of trains involved Capital infrastructure investment needs to be carefully coordinated, with the overall rail system effectiveness in mind. All of the rail users and beneficiaries have a role to play in determining what needs to be built and appropriate levels of investment from the parties.

Washington State believes that it is in the public interest to invest in the rail system to facilitate the efficient and effective movement of goods and people WSDOT continues to work closely with BNSF Railway, Union Pacific, Amtrak, Ports, and the

State Legislature to refine system needs and identify appropriate investments WSDOT must be able to demonstrate that public investment in the rail system will derive public benefits WSDOT will then propose to the legislature to make investments where these can be justified. However, the level of public investment must take into account the public benefits that will be received.

Our guiding principles are.

- Projects solely driven by passenger interests are the public's responsibility
- Projects solely driven by freight interests are the responsibility of the freight railroads.
- Projects that are driven by both and have mutual benefits must have mutual financial participation.

Closely tied to infrastructure improvements is the need to utilize operating practices that optimize the use of both the existing infrastructure and improvements In consideration for public investment in this privately-owned infrastructure, the freight railroads must provide public benefits, including improved operational reliability (on-time performance), enhanced safety and service enhancements (frequencies and/or travel time reductions)

WSDOT is committed to working with the freight railroads and Amtrak to make improvements to operating practices that provide greater utility from the infrastructure for all users

3. Carrier-Imposed requirements for infrastructure investments by shippers (and the public)

The Class I railroads in the United States have begun to entertain the concept of

"Public Private Partnerships" within approximately the last 7-10 years These began with the investment of capital by public entities for rail grade separations in order to improve safety However, the Class I railroads now have extended their reach, in terms of need, to require financial assistance in areas for which they have historically born responsibility

Finally, the railroads have historically been responsible for building rail spurs to serve industry As businesses and manufacturers have located close to rail lines, the railroads have paid for the development of service from the mainline to the business facility As Class I railroads have abandoned rail lines or sold them to short lines, that responsibility – both logistically and financially – has shifted to either the shipper or the shortline The sale to shortlines has resulted in a "Last Mile Syndrome" – the higher cost to move the last transit part of the journey (or the first) at a much higher cost Shortline railroads need to charge a much higher per-mile cost to maintain their balance sheets than do line haul or Class I railroads

Capacity improvements are critical Railroads have indicated the level of investment they are willing to make in infrastructure improvements Stakeholders encourage the STB to consider operational as well as infrastructure improvements when addressing policies regarding capacity Also, stakeholders would encourage STB to look at areas where "paper barriers" may be a capacity and access constraint. Co-production is one method of addressing these capacity and access issues and has been successfully implemented in Canada There are certain corridors in the U S. that could lend themselves to capacity improvements with directional running, however the impact on the Class 1s of this approach would likely be significant. In Washington, we are working

closely with the railroads and stakeholders to develop mutually beneficial solutions to capacity and access issues

One of the challenges faced in Washington State is when carriers make infrastructure demands of a shipper, the shipper often turns to the state to request funding for the project. In this scenario, it seems the pass-through demand/access to State funding is germane to the larger discussion of Federal vs State transportation infrastructure funding, particularly in a circumstance where Federal pre-emption rules create obstacles in negotiating with rail carriers. Without additional Federal funding for key transportation infrastructure, perhaps certain rules could be adjusted to allow states to make such investments more effectively.

As an example, the Federal government could establish rules that reduce the disparity between the state and the rail carrier. The Federal regulations could specify that a rail carrier must grant permits for state-funded development under X, Y, or Z circumstance, without additional demands; or the STB or some other Federal entity would review each state's strategic plan for investment and, if approved, then will require the rail carrier to work with the state without additional added state funding. There are numerous other processes that could be explored to allow for additional investment

4. Economically motivated service reductions and metering of the demand for service

The Western United States essentially exists under a duopoly in terms of railroads Since the last great merger between the Union Pacific and the Southern Pacific, monitoring the competition's sales and operational efforts has become relatively easy This visibility, along with the increased pressure from both shareholders and Wall Street

for Class I's to meet their cost of capital, has lead to reductions in service. in preference for a "hook and haul" business model

If switching of railcars or "work events" are required, the Class I railroads work to eliminate those costs. This greatly reduces the possibility of smaller shippers being able to receive service from a Class I railroad and so service decreases. The only alternative for service is a shortline railroad to consolidate cars into full trains which leads to the financial consequences already described

In terms of Washington Ports, delays can be experienced for single steamship lines that do not have enough volume for a specific destination. These delays end when sufficient volume can be consolidated with other terminals, or when additional containers arrive The cost of goods delayed in transit increases the cost to the ultimate consumer, through either increased inventories in the supply chain, or late arrival at destination resulting in stock outs

5. When it becomes necessary to obtain abandonment authorization

The abandonment procedure affects communities, not just a single business versus a rail line. The formal review process undertaken by the Surface Transportation Board that allows for input from all stakeholders including the railroad, the shippers dependent on that rail line and the local communities that provides an opportunity for all stakeholders to present the overall potential impact on revenue, jobs, and tax base needs to be better communicated .

In the most recent state Legislative session, a bill was introduced to expand the scope of the Department of Transportation to assist the established STB rail line abandonment process in terms of public outreach. While this bill did not pass, it clearly

demonstrates the need for public outreach and communication on a process that not only affects the rail carrier, but also the communities where the rail line is located along with numerous local governmental entities The Washington Department of Transportation would like to work with the STB to review the issues being dealt with and possible solutions to meet the needs of those mentioned previously at your convenience

6. To whom does the common carrier obligation apply?

The primary application of the term "common carrier" has been applied to those services deemed by the US government as under English common law The courts imposed three distinctive obligations upon common carriers (1) they have a duty to serve all who apply for their services, (2) unreasonableness in their rates of charge and operations is prohibited, and (3) they are held to liability standards far stricter than those applied in general business law

Historically, the ICC was responsible for administering not only the implementation of these guidelines, but also to regulate the cost of carriage on the railroads in the United States. Since the sunset of the ICC and deregulation through the *Staggers Act* in the United States, the responsibility has now fallen to the Surface Transportation Board and the Federal Railroad Administration to determine when and how (safety issues) materials and persons shall be transported.

By the mid-1990s, the ICC retained only limited regulatory authority. Under the ICC Termination Act of 1995, the commission was abolished at the end of that year. Some of its remaining responsibilities, including the power to set minimum rates and to pass on discontinuance of passenger train service, were eliminated entirely. Others, including the right to regulate rail mergers and rate discrimination, were assigned to the

newly established Surface Transportation Board. However, the common carrier obligation was originally issued to railroads in the United States in return for rights to lands and right of ways now referred to by railroads as their "franchise". These lands were either granted or sold very cheaply to railroads "in perpetuity" It could be argued that because the lands are still available to those railroads, that they retain the obligation to remain a common carrier, regardless of changes in legislation over time

Primarily, stakeholders believe per the above "(1) they have a duty to serve all who apply for their services", is the overriding definition of common carrier today It can be argued that essential services to the United States in a global economy include distribution of international import containers, agricultural products, coal, and hazardous materials in order to maintain our nation's GDP All of these products appear to be better suited to travel via bulk on railroads than via the nation's highways In addition, the environmental benefits of using rail over truck are extensive Approximately 240-280 truck loads are taken off our nation's highways for each double stack intermodal train that moves. The railroads can also move one ton of freight approximately 400 miles for one gallon of fuel

Hazardous materials are essential to the economy of the United States and the well being of its people. Railroads annually carry over 1 7 million shipments of hazardous materials including explosive, poisonous, corrosive, flammable and radioactive materials As common carriers, railroads are obligated to accept hazardous cargo that is tendered in compliance with legal requirements, whether or not they would choose to do so for business reasons. This common carrier obligation ensures that shippers are given the opportunity to ship hazardous materials, including the most

dangerous hazardous materials, in the safest, most secure manner possible. Based on conversations with many stakeholders in the State who use the rail system and respected authorities on rail matters, there is agreement that the common carrier obligations imposed when the land was transferred to the railroads still applies, but it is far less clear what those obligations entail given the significant changes in the business and regulatory landscape Has the concept of a common carrier obligation lost much of its currency?

7. Toxic Inhalant Hazards

As Class I railroads near 100% of capacity, their representatives talk of unit train shipments they prefer and cargo they would rather not haul. The American Association of Railroads (AAR) has focused for the past year on products classified TIH (toxic inhalant hazards) including chlorine and anhydrous ammonia AAR has testified many times in the past that the safest way to move hazardous materials is by rail The AAR has lobbied the federal Department of Transportation to require a new generation of TIH rail cars They initially pushed for cars so heavy that anhydrous ammonia (NH3) would no longer be possible to transport on most rail lines DOT disagreed with the AAR approach and stated they had no evidence the cars they suggested were safer. The fertilizer industry has been actively working within the framework of the Federal Railway Administration rulemaking process to develop new tank cars for ammonia and the industry has an excellent safety record. AAR complained about the cost of liability insurance for these products When the fertilizer association responded with a proposal for an industry-funded insurance pool, AAR replied with the concern that they could be in violation of antitrust rules if they participated. The safe transportation of products for Washington's agricultural sector is critical for sustaining one of Washington's major economic drivers

While there are less concentrated alternatives of anhydrous ammonia that are available, the cost ratio for these products would likely double the cost of transportation to achieve the similar benefit Stakeholders would hope for a resolution for our agricultural sector, as well as other industries that benefit from the safe transportation of products that would be classified as TIH products

The Washington Department of Transportation concludes its statement by again thanking the Board for the opportunity to testify on behalf of our stakeholders at this significant proceeding and expressing our hope that the comments submitted by all parties will assist the Board in defining the "common carrier obligation" and all parts of that definition specifically called out

Respectfully submitted,

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